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No. 04-1191

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOYCE MORGAN, *et al.*,

Petitioners,

versus

SKF USA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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This is the petitioners' Reply Brief.

The respondent asserts that petitioners' case is not worthy of this Court's attention because:

1. It, " . . . presents a straightforward application of the Court's settled precedent" (Brief in Opposition, p. 2); and

2. There is no split of authority among the Circuit Courts of Appeal that could justify this Court's review (*Id.*, p. 3).

The first assertion is misleading; the second is beside the point. They both ignore the fact that the issues presented by this Petition are of great public importance, justifying this Court's review of this case pursuant to Rule 10(c) of the Rules of the Supreme Court.

The respondent finds "settled precedent" applicable to this case in the opinion of this Court in the case of *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (Brief in Opposition, p. 2).

This Court did establish in the *Firestone* opinion the principle that courts are limited to determining if an ERISA plan administrator's interpretation of plan language or denial of benefits is "arbitrary and capricious" where the plan vests discretion with the administrator in these areas. However, the Court made no effort to articulate the parameters of such judicial review in *Firestone*. This was because the standard of review applicable to the plan administrator's actions and interpretations in the *Firestone* case was de novo, and not arbitrary and capricious.

The question presented by this case is not simply whether or not the courts below properly applied the arbitrary and capricious standard as respondent asserts.

The central question presented here is that of what are the parameters of judicial review that is limited to a determination of the arbitrariness or capriciousness of a plan administrator's interpretation of plan language or denial of plan benefits.

There is no settled precedent from this Court on this issue.

The cases cited in the briefs of the parties in this proceeding indicate that the only federal judicial circuit that had begun to develop any "settled precedent" upon the issue presented by this case was the very circuit from which this case arose.

Unfortunately, that circuit's published opinion in this case has unsettled all of its precedents that set forth parameters for properly determining when ERISA plan administrators have acted arbitrarily and capriciously.

It did this, of course, by ignoring two of the most important of the " . . . federal common law rules of contract interpretation," that it had previously established for use in cases such as this in the opinions of *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir., 1998), en banc, and *Gallo v. Madera*, 136 F.3d 326, 330 (6th Cir., 1998) [petitioners' Brief, pp. 6, 10-13].

These two cases, along with *Shelby County Health Care Corp. v. Southern Council of Industrial Workers' Health and Welfare Trust Fund*, 203 F.3d 926, 934 (6th Cir., 2000) and *Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329, 334 (6th Cir., 1988),

provided clear and easily applied principles for determining when an ERISA governed benefit plan administrator has interpreted or acted upon plan language arbitrarily and capriciously.

The opinion in this case undermined these principles. It ignores most of them, and openly invites plan administrators to rely upon it to do the same.

The two cases upon which the respondents relied in their brief certainly provide no "settled precedent" upon the issue at bar.

One of them, *Blank v. Bethlehem Steel Corp.*, 926 F.2d 1090 (11th Cir., 1991), is pretty much a carbon copy of *Rowe v. Allied Chemical Hourly Employees Pension Plan*, 915 F.2d 266 (6th Cir., 1990). Again, *Rowe* involved a change in employers without any corresponding change in the affected employees' pension plan. Likewise, in *Blank*, 926 F.2d at 1092, the corporate seller agreed to honor service with its purchaser for purposes of employees' accruing benefits under the plan. In both cases, it was not arbitrary and capricious, or in any way violative of the employees' rights, to deny them early retirement benefits from their original employer. This is because both the original and the new employer had seen to it that the employees' pension plan was unaffected by the sale.

In the case at bar, of course, this did not happen.

The other case cited by Respondent, *Kostrosits v. GATX Corp. Non-Contributory Pension Plan for Salaried Employees*, 970 F.3d 1165 (3d Cir., 1992), is more similar to the case at bar. The plan administrator denied early retirement benefits to workers who were placed in another pension plan upon a sort of corporate sale.

However, certain unusual facts strip *Kostrosits* of any precedential value. It did not involve a typical corporate sale of an ongoing business. Instead, it arose in conjunction with a stock sale of a corporate subsidiary to an entity owned by the management of the "new" entity and a private investor. As a result, according to the Court, 970 F.3d at 1170:

> After the transfer of Fuller stock in the leveraged buyout, the employees remained employed by the same company, under the same management, at the same place, doing the same jobs, under the same conditions, for the same direct compensation. They lost no work time, and accordingly no direct compensation.

In the case at bar, on the contrary, the plaintiffs and their co-workers did not remain employed by the same company, and they did not remain employed under the same management.

The parties in *Kostrosits* stipulated that " . . . the transaction occasioned a termination of employment with a GATX affiliate for purposes of applying [their pension] plan." Since they worked for the same company both before and after the stock transfer deal, however, it was pretty hard for the plaintiffs to argue that they had been "laid off" despite this stipulation. Indeed, the parties and the Court of Appeals for the Third Circuit approached the case as if the central question were whether or not the plaintiffs had suffered a "temporary suspension of employment" due to uncertainty as to their continued employment upon the stock sale, *Id.*, at 1171. The plaintiffs did not argue that they had been "laid off" in any traditional sense.

Based upon these unusual facts, a history of the plan administrator's decisions in related situations, and the existing case law, the court of appeals held that it was "reasonable" for the plan administrator to equate the word "layoff" in the plan at issue with " . . . a situation involving a loss of work time and direct compensation." *Id.*

Of course, there is nothing amiss with this definition so long as one is discussing a situation involving a single employer. A layoff can only occur " . . . at the employer's instigation," *Black's Law Dictionary* (7th Ed., 1999). If, as happened in *Kostrosits*, an employee's employer remains the same, and the employer never announces that it is "laying off" the employee, the only way that the employee can justifiably claim that he was "laid off" is if he loses work time or compensation.

The petitioners, of course, were not dealing with a single employer, but two employers. Their first employer clearly subjected them to a "layoff," even though they continued to work (for another employer), because it instigated the termination of their employment, *Black's Law Dictionary* (7th Ed., 1999).

Significantly, *Kostrosits* was decided well before the United States Court of Appeals for the Sixth Circuit had established its federal common law rules of contract construction for cases such as this.

It should not be permitted to disestablish them.

The lack of settled precedent in this area is a matter of great public importance. Millions of Americans participate in ERISA governed benefit plans. Increasingly, these plans vest their administrators with broad discretion to interpret plan language and make decisions relating to

benefits. The parameters of this discretion are of vital importance to plan members who must, at all costs, be protected from abuse of that discretion by arbitrary and capricious decisions. If the Courts cannot identify such decisions, or refuse to do so, the purposes of ERISA will be thwarted.

This Court should grant this petition so that it can articulate clear standards for the Courts to apply when determining if ERISA plan administrators have interpreted plan language arbitrarily and capriciously or denied benefits in the same manner.

Respectfully submitted,

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